

1-1 By: Ellis, Duncan S.B. No. 1655
1-2 (In the Senate - Filed March 8, 2007; March 21, 2007, read
1-3 first time and referred to Committee on Criminal Justice;
1-4 April 10, 2007, reported adversely, with favorable Committee
1-5 Substitute by the following vote: Yeas 5, Nays 0; April 10, 2007,
1-6 sent to printer.)

1-7 COMMITTEE SUBSTITUTE FOR S.B. No. 1655 By: Ellis

1-8 A BILL TO BE ENTITLED
1-9 AN ACT

1-10 relating to the establishment of the capital writs committee of the
1-11 Texas Judicial Council and the creation of the office of capital
1-12 writs.

1-13 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-14 SECTION 1. Subsection (c), Section 71.060, Government Code,
1-15 is amended to read as follows:

1-16 (c) Any qualification standards adopted by the Task Force on
1-17 Indigent Defense under Subsection (a) that relate to the
1-18 appointment of counsel in a death penalty case must be consistent
1-19 with any applicable [the] standards adopted [specified] under
1-20 Subchapter F [Article 26.052(d), Code of Criminal Procedure]. An
1-21 attorney who is identified by the task force as not satisfying
1-22 performance or qualification standards adopted by the task force
1-23 under Subsection (a) may not accept an appointment in a capital
1-24 case.

1-25 SECTION 2. Chapter 71, Government Code, is amended by
1-26 adding Subchapters E and F to read as follows:

1-27 SUBCHAPTER E. CAPITAL WRITS COMMITTEE

1-28 Sec. 71.071. DEFINITIONS. In this subchapter:

1-29 (1) "Committee" means the capital writs committee
1-30 established under this subchapter.

1-31 (2) "Office of capital writs" means the office of
1-32 capital writs established under Subchapter F.

1-33 Sec. 71.072. ESTABLISHMENT OF COMMITTEE; DUTIES. (a) The
1-34 capital writs committee is established as a standing committee of
1-35 the council.

1-36 (b) The committee shall:

1-37 (1) oversee the creation of the office of capital
1-38 writs; and

1-39 (2) recommend to the court of criminal appeals a
1-40 director for the office of capital writs.

1-41 Sec. 71.073. APPOINTMENT AND COMPOSITION OF COMMITTEE.

1-42 (a) The committee is composed of the following five members who
1-43 are appointed by and serve at the pleasure of the president of the
1-44 State Bar of Texas:

1-45 (1) three attorneys who are members of the State Bar of
1-46 Texas and who are not employed as prosecutors or law enforcement
1-47 officials, one of whom must have knowledge of and experience with
1-48 habeas corpus proceedings in this state;

1-49 (2) one state district judge; and

1-50 (3) one state appellate judge who is not a member of
1-51 the court of criminal appeals.

1-52 (b) The committee shall elect one member of the committee to
1-53 serve as the presiding officer of the committee.

1-54 Sec. 71.074. RECOMMENDATION AND APPOINTMENT OF DIRECTOR OF
1-55 OFFICE OF CAPITAL WRITS. (a) The committee shall submit to the
1-56 court of criminal appeals, in order of the committee's preference,
1-57 a list of the names of not fewer than three and not more than five
1-58 persons the committee recommends that the court consider in
1-59 appointing the director of the office of capital writs.

1-60 (b) Each person recommended to the court of criminal appeals
1-61 by the committee under Subsection (a) must exhibit proficiency in
1-62 and commitment to providing quality representation to defendants in
1-63 death penalty cases, as described by the Guidelines and Standards

2-1 for Texas Capital Counsel, as published by the State Bar of Texas.

2-2 (c) The court of criminal appeals shall appoint from the
2-3 list of persons submitted to the court under Subsection (a) the
2-4 director of the office of capital writs.

2-5 [Sections 71.075-71.090 reserved for expansion]

2-6 SUBCHAPTER F. OFFICE OF CAPITAL WRITS

2-7 Sec. 71.091. DEFINITIONS. In this subchapter:

2-8 (1) "Committee" means the capital writs committee
2-9 established under Subchapter E.

2-10 (2) "Office" means the office of capital writs
2-11 established and operated under this subchapter.

2-12 Sec. 71.092. ESTABLISHMENT; FUNDING. (a) The office of
2-13 capital writs is established as a standing committee of the council
2-14 and operates under the direction and supervision of the director of
2-15 the office.

2-16 (b) The office shall receive funds for personnel costs and
2-17 expenses as specified in the General Appropriations Act.

2-18 Sec. 71.093. DIRECTOR; STAFF. (a) The court of criminal
2-19 appeals shall employ a director to direct and supervise the
2-20 operation of the office. The director serves a four-year term.

2-21 (b) The director shall employ attorneys, licensed
2-22 investigators, and other personnel necessary to perform the duties
2-23 of the office.

2-24 (c) The director and any attorney employed by the office may
2-25 not:

2-26 (1) engage in the private practice of criminal law; or

2-27 (2) accept anything of value not authorized by this
2-28 chapter for services rendered under this subchapter.

2-29 Sec. 71.094. POWERS AND DUTIES. (a) The office may refuse
2-30 an appointment under Article 11.071, Code of Criminal Procedure,
2-31 only if:

2-32 (1) a conflict of interest exists;

2-33 (2) the office has insufficient resources to provide
2-34 adequate representation for the defendant;

2-35 (3) the office is incapable of providing
2-36 representation for the defendant in accordance with the rules of
2-37 professional conduct; or

2-38 (4) the office shows other good cause for refusing the
2-39 appointment.

2-40 (b) The office may not represent a defendant in a federal
2-41 habeas review. The office may not represent a defendant in an
2-42 action or proceeding in state court other than an action or
2-43 proceeding that:

2-44 (1) is conducted under Article 11.071, Code of
2-45 Criminal Procedure;

2-46 (2) is collateral to the preparation of an application
2-47 under Article 11.071, Code of Criminal Procedure; or

2-48 (3) concerns any other post-conviction matter,
2-49 including an action or proceeding under Article 46.05 or Chapter
2-50 64, Code of Criminal Procedure.

2-51 (c) Notwithstanding Article 26.04(p), Code of Criminal
2-52 Procedure, the office may independently investigate the financial
2-53 condition of any person the office is appointed to represent. The
2-54 office shall report the results of the investigation to the
2-55 appointing judge. The judge may hold a hearing to determine if the
2-56 person is indigent and entitled to representation under this
2-57 article.

2-58 (d) The court may not appoint the office to represent a
2-59 defendant in an application for a writ of habeas corpus if:

2-60 (1) the court has previously appointed counsel other
2-61 than the office under this section in the case; or

2-62 (2) the defendant has previously retained counsel to
2-63 represent the defendant in an application for a writ of habeas
2-64 corpus in the case.

2-65 (e) The office shall maintain a list of competent counsel
2-66 available for appointment under Section 2(f), Article 11.071, Code
2-67 of Criminal Procedure, if the office refuses an appointment under
2-68 Subsection (a) or is prohibited from accepting an appointment under
2-69 Subsection (d).

3-1 Sec. 71.095. COMPENSATION OF OTHER APPOINTED ATTORNEYS. If
 3-2 it is necessary that an attorney other than an attorney employed by
 3-3 the office be appointed, that attorney shall be compensated as
 3-4 provided by Article 26.05, Code of Criminal Procedure.

3-5 SECTION 3. Subsections (b), (c), (e), and (f), Section 2,
 3-6 Article 11.071, Code of Criminal Procedure, are amended to read as
 3-7 follows:

3-8 (b) If a defendant is sentenced to death the convicting
 3-9 court, immediately after judgment is entered under Article 42.01,
 3-10 shall determine if the defendant is indigent and, if so, whether the
 3-11 defendant desires appointment of counsel for the purpose of a writ
 3-12 of habeas corpus. If the defendant desires appointment of counsel
 3-13 for the purpose of a writ of habeas corpus, the court shall appoint
 3-14 the office of capital writs to represent the defendant as provided
 3-15 by Subsection (c).

3-16 (c) At the earliest practical time, but in no event later
 3-17 than 30 days, after the convicting court makes the findings
 3-18 required under Subsections (a) and (b), the convicting court shall
 3-19 appoint the office of capital writs or, if the office of capital
 3-20 writs refuses or is prohibited from accepting an appointment under
 3-21 Section 71.094, Government Code, other competent counsel, unless
 3-22 the applicant elects to proceed pro se or is represented by retained
 3-23 counsel. On appointing counsel under this section, the convicting
 3-24 court shall immediately notify the court of criminal appeals of the
 3-25 appointment, including in the notice a copy of the judgment and the
 3-26 name, address, and telephone number of the appointed counsel.

3-27 (e) If the court of criminal appeals denies an applicant
 3-28 relief under this article, an attorney appointed under this section
 3-29 to represent the applicant shall, not later than the 15th day after
 3-30 the date the court of criminal appeals denies relief or, if the case
 3-31 is filed and set for submission, the 15th day after the date the
 3-32 court of criminal appeals issues a mandate on the initial
 3-33 application for a writ of habeas corpus under this article, move for
 3-34 the appointment of [to be appointed as] counsel in federal habeas
 3-35 review under 21 U.S.C. Section 848(q) or equivalent provision [or,
 3-36 if necessary, move for the appointment of other counsel under 21
 3-37 U.S.C. Section 848(q) or equivalent provision]. The attorney shall
 3-38 immediately file a copy of the motion with the court of criminal
 3-39 appeals, and if the attorney fails to do so, the court may take any
 3-40 action to ensure that the applicant's right to federal habeas
 3-41 review is protected, including initiating contempt proceedings
 3-42 against the attorney.

3-43 (f) If the office of capital writs refuses or is prohibited
 3-44 from accepting an appointment under Section 71.094, Government
 3-45 Code, the [The] convicting court shall appoint counsel from a list
 3-46 of competent counsel maintained by the office of capital writs. The
 3-47 convicting court shall reasonably compensate as provided by Section
 3-48 2A an attorney appointed under this section, other than an attorney
 3-49 employed by the office of capital writs, regardless of whether the
 3-50 attorney is appointed by the convicting court or was appointed by
 3-51 the court of criminal appeals under prior law. An attorney
 3-52 appointed under this section who is employed by the office of
 3-53 capital writs shall be compensated in accordance with Subchapter F,
 3-54 Chapter 71, Government Code.

3-55 SECTION 4. Subsections (e) and (f), Section 4A, Article
 3-56 11.071, Code of Criminal Procedure, are amended to read as follows:

3-57 (e) Sections 2A and 3 apply to compensation and
 3-58 reimbursement of counsel appointed under Subsection (b)(3) in the
 3-59 same manner as if counsel had been appointed by the convicting
 3-60 court, unless the attorney is employed by the office of capital
 3-61 writs, in which case the attorney is compensated in accordance with
 3-62 Subchapter F, Chapter 71, Government Code.

3-63 (f) Notwithstanding any other provision of this article,
 3-64 the court of criminal appeals shall appoint counsel and establish a
 3-65 new filing date for application, which may be no later than the
 3-66 270th day after the date on which counsel is appointed, for each
 3-67 applicant who before September 1, 1999, filed an untimely
 3-68 application or failed to file an application before the date
 3-69 required by Section 4(a) or (b). Section 2A applies to the

4-1 compensation and payment of expenses of counsel appointed by the
4-2 court of criminal appeals under this subsection, unless the
4-3 attorney is employed by the office of capital writs, in which case
4-4 the attorney is compensated in accordance with Subchapter F,
4-5 Chapter 71, Government Code.

4-6 SECTION 5. Subsection (b), Article 26.04, Code of Criminal
4-7 Procedure, is amended to read as follows:

4-8 (b) Procedures adopted under Subsection (a) shall:

4-9 (1) authorize only the judges of the county courts,
4-10 statutory county courts, and district courts trying criminal cases
4-11 in the county, or the judges' designee, to appoint counsel for
4-12 indigent defendants in the county;

4-13 (2) apply to each appointment of counsel made by a
4-14 judge or the judges' designee in the county;

4-15 (3) ensure that each indigent defendant in the county
4-16 who is charged with a misdemeanor punishable by confinement or with
4-17 a felony and who appears in court without counsel has an opportunity
4-18 to confer with appointed counsel before the commencement of
4-19 judicial proceedings;

4-20 (4) require appointments for defendants in capital
4-21 cases in which the death penalty is sought to comply with any
4-22 applicable [the] requirements under Article 26.052 of this code, or
4-23 Subchapters E and F, Chapter 71, Government Code;

4-24 (5) ensure that each attorney appointed from a public
4-25 appointment list to represent an indigent defendant perform the
4-26 attorney's duty owed to the defendant in accordance with the
4-27 adopted procedures, the requirements of this code, and applicable
4-28 rules of ethics; and

4-29 (6) ensure that appointments are allocated among
4-30 qualified attorneys in a manner that is fair, neutral, and
4-31 nondiscriminatory.

4-32 SECTION 6. Subsection (a), Article 26.044, Code of Criminal
4-33 Procedure, is amended by adding Subdivision (3) to read as follows:

4-34 (3) "Office of capital writs" means the office of
4-35 capital writs established under Subchapter F, Chapter 71,
4-36 Government Code.

4-37 SECTION 7. Article 26.044, Code of Criminal Procedure, is
4-38 amended by adding Subsection (n) to read as follows:

4-39 (n) A public defender may be appointed with respect to an
4-40 application for a writ of habeas corpus only if an attorney employed
4-41 by the office of capital writs is not appointed in the case.

4-42 SECTION 8. Subsection (a), Article 26.05, Code of Criminal
4-43 Procedure, is amended to read as follows:

4-44 (a) A counsel, other than an attorney with a public defender
4-45 or an attorney employed by the office of capital writs, appointed to
4-46 represent a defendant in a criminal proceeding, including a habeas
4-47 corpus hearing, shall be paid a reasonable attorney's fee for
4-48 performing the following services, based on the time and labor
4-49 required, the complexity of the case, and the experience and
4-50 ability of the appointed counsel:

4-51 (1) time spent in court making an appearance on behalf
4-52 of the defendant as evidenced by a docket entry, time spent in
4-53 trial, and time spent in a proceeding in which sworn oral testimony
4-54 is elicited;

4-55 (2) reasonable and necessary time spent out of court
4-56 on the case, supported by any documentation that the court
4-57 requires;

4-58 (3) preparation of an appellate brief and preparation
4-59 and presentation of oral argument to a court of appeals or the Court
4-60 of Criminal Appeals; and

4-61 (4) preparation of a motion for rehearing.

4-62 SECTION 9. Subsection (d), Section 2, Article 11.071, Code
4-63 of Criminal Procedure, is repealed.

4-64 SECTION 10. (a) Not later than January 15, 2008, the
4-65 president of the State Bar of Texas shall appoint the members of the
4-66 capital writs committee.

4-67 (b) Not later than May 15, 2008, the capital writs committee
4-68 shall submit to the court of criminal appeals the list of candidates
4-69 for the position of the director of the office of capital writs.

5-1 (c) Not later than September 1, 2008, the Court of Criminal
5-2 Appeals shall employ the director of the office of capital writs
5-3 under Subchapter F, Chapter 71, Government Code, as added by this
5-4 Act.

5-5 SECTION 11. This Act takes effect September 1, 2007.

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